

REVISION OF STATE BAIL LAWS

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Inspired perhaps by publicity associated with the federal revision of bail laws,¹ the success of privately funded release on own recognizance projects in state courts, and the surfacing of bondsmen's activities in state bail systems in newspapers and judicial opinions, state legislatures are currently taking a closer look at their bail laws. Since 1967 a few states² have adopted revised bail laws that parallel the federal bail scheme.

This article identifies and examines some of the important elements in the revision of state bail laws. Some of the matters discussed include the paper nature of the accomplishments of some state revisions in the presumptive use of release on own recognizance, the problems associated with the statutory commands to individualize the bail issue, the successful operation of the Illinois ten percent deposit form of bail with the consequence of eliminating bail bondsmen from the Illinois bail system, and finally the importance of understanding the managerial aspects of a state bail system before revision so that the revision does not become a statutory cast beneath which an unchanged state bail system operates. Considerable attention is paid to the professional bail bondsman. Unique to the criminal processes of only the United States and the Philippines,³ he remains at the core of many state bail systems. This article illustrates the dilemma involved in chipping away at his profits by setting limits over his heretofore largely uncontrolled operations and by introducing non-financial and more flexible forms of bail, thereby reducing his business opportunities. The article suggests that state bail revision should take an all or nothing approach to the role of bondsmen, and supported by the experience of Illinois and the recommendations of the American Bar Association,⁴ urges the "nothing" approach. Among the elements of bail revision not discussed herein is the problem of preventive detention, which has already been treated to considerable recent discussion and empirical examination.⁵

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¹ 18 U.S.C. §§ 3146 *et. seq.* (Supp. II 1966).

² See, e.g., ALASKA STAT. § 12.30.020 (Supp. 1970); ARIZ. CRIM. CODE, § 13-1577 (Supp. 1970); IOWA CODE ANN. § 763.16 (Supp. 1971); KANSAS CRIM. CODE & PROC. § 22-2802 (1969).

³ ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, § 5.4 (1968).

⁴ *Id.*

⁵ *Preventive Detention: An Empirical Analysis*, 6 HARV. CIVIL RIGHTS—CIVIL LIB. L. REV. 291 (1971).

I. THE TEN PERCENT DEPOSIT FORM OF BAIL

A. *The What and Why of Ten Percent Deposit*

The ten percent deposit form of state bail accepts the financial realities of the current process of achieving pre-trial release in nearly all states. A professional bail bondsman is usually paid ten percent of the amount of bail listed on the bail schedule or set by a judicial officer,⁶ and the bondsman, in turn, supplies one of the forms of bail recognized by the state law.⁷ That this model of pre-trial release predominates in state bail systems is supported by published empirical evidence on the dependence of state bail systems on bondsmen, the widespread use of bail schedules,⁸ and the charges made by bondsmen for their services. Under the ten percent deposit form of bail, the accused deposits ten percent of the total amount of the bail with a state officer instead of the bondsmen, and all or ninety percent of the deposit is returned to the accused on fulfillment of his court appearance obligations. The rationale supporting state adoption and full implementation of a ten percent deposit form is based upon the elimination of unnecessary cost to the defendant of pre-trial release, the restoration of judicial control over the bail system, and the elimination of bondsmen from the bail system.⁹

B. *Restoring Judicial Control Over the State Bail System*

Under the present model of bail predominating in most states, the court's chore is setting the amount of bail. As one court said referring to a jurisdiction then dependent on bondsmen, this is a relatively unimportant chore when an accused uses the services of a bondsman to achieve his release.¹⁰ This is true because setting bail in these cases does not define the defendant's real financial stake in fulfilling his court appearance obliga-

⁶ *United States Fidelity & Guar. Co. v. State Bd. of Equalization*, 47 Cal.2d 384, 386, 303 P.2d 1034, 1037 (1956); *Hearings on S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess., at 164 (1964); see Nat'l Conference on Bail and Criminal Justice, PROCEEDINGS 245 (1965). Bondsmen who act as agents for surety insurance companies are bound by the filed rate of the company for which he acts as agent. See, e.g., OHIO REV. CODE ANN. § 3937.03 (A) (Page 1954). If the insurance company opts to affiliate with a rating association, it must adhere to the filings by the association unless it files a deviated rate. See, e.g., OHIO REV. CODE ANN. § 3937.06 (Page 1954). The National Surety Association is licensed in most states as the rating association for bail bonds, and the rate filed by the Association open to the public has been two percent of the amount of the bail bond. OHIO REV. CODE ANN. § 3937.03 (A) (Page 1954). Most agents acting for surety companies licensed by the Association charge a premium of ten percent and explain the excess (eight percent of the bail bond) as a service charge. *United States Fidelity & Guar. Co. v. State Bd. of Equalization*, 47 Cal.2d 384, 386, 303 P.2d 1034, 1035 (1956).

⁷ See, e.g., OHIO REV. CODE ANN. § 2937.22 (Page Supp. 1970).

⁸ Silverstein, *Bail in the State Courts—A Field Study and Report*, 50 MINN. L. REV. 621 (1966).

⁹ Committee comments to ILL. ANN. STAT. ch. 38, § 110-7 (Smith-Hurd 1970).

¹⁰ *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion).

tion. The possible elements of this stake are the ten percent paid for the bond, the amount of collateral or number of co-signers, if any, and the recorded obligation of the defendant as principal obligor to pay the amount of the bail upon default. When a release is effectuated by a bondsman, the court controls only a third of these elements and that element does not involve the defendant's parting with any assets prior to his release. The ten percent paid to the bondsman for the bond is non-refundable, and the bondsman's decisions to demand collateral, or co-signers, or to set the amount of collateral are completely uncontrolled by the court.¹¹ Therefore, in a release effectuated by a bondsman, the court simply does not control the extent of the defendant's financial stake in returning to court.

By contrast, when a defendant provides bail by a deposit of his own cash securities, the elements of his stake in returning to court are controlled by the court in setting the bail amount. This also applies to a release by ten percent deposit.¹² The elements of the stake, known and controlled by the court, are the ten percent deposit and the recorded obligation to pay the amount of the bail upon default. Furthermore, the prospect of return of the deposit introduces a financial inducement to the defendant to appear for trial in all releases under this form of bail. This may also be true in a release with collateral demanded by the bondsman, but as stated previously, the decision to demand collateral is the bondsman's, not the court's.

II. ELIMINATING BONDSMEN FROM THE STATE BAIL SYSTEM

The major battle over the adoption and full implementation of a state ten percent deposit form of bail centers on the retention or elimination of the bondsmen as the cornerstone of state bail systems. Arguments for the elimination of bondsmen often concentrate on the sins of bondsmen or their suspected sins. Reports resulting from investigations by state attorneys general,¹³ grand juries,¹⁴ bar associations,¹⁵ and newspapers¹⁶ are mo-

¹¹ The only possible control over collateral demands of a bondsman arises out of a provision in the Uniform Bail Bondsmen Licensing Act which requires a bondsman to file an affidavit stating whether he received any security for his undertaking, and, if so, the nature and amount. Uniform Bail Bondsmen Licensing Act, § 305, Nat'l Ass'n of Insurance Comm'rs, 1 PROCEEDINGS 116 (1963). But the purpose of this provision is not to apprise the court at the time of setting of a bail amount of what collateral is being demanded by the bondsman.

¹² Professor Bowman, the drafter of the Illinois legislation, has said that: "The 10-percent provision is designed to restore the administration of bail to the courts . . . and to eliminate the private professional bail bondsman from the criminal justice administrative processes." *Hearings*, *supra* note 6.

¹³ Comm. of Penn., REPORT OF THE ATTORNEY GENERAL ON THE INVESTIGATION OF THE MAGISTERIAL SYSTEM, Ch. X, at 304, 342 (1965).

¹⁴ Report of the Third February 1954 Grand Jury of New York County in 17 LAWYERS GUILD REV. 149 (1957).

¹⁵ Funk, *The Bondsman Problem*, 19 KY. ST. B.J. 14 (1954); Sweet, *Bail or Jail*, 19 RECORD OF N.Y.C.B.A. 11 (1964).

notonous in their repetition of the usual catalog of abuses such as fee splitting with lawyers or court clerks, participating in the "fixing" of minor criminal cases and charges in excess of the regulated rate. A New York City Bar Association Report capped its description of bondsmen's influence on the administration of criminal justice in this manner:

Whether demonstrably true or not, it is the belief of many, reached through close observation of the courts and their operation, that in an imperfect world the greatest danger of corruption of the administration of criminal justice lies in the existence of the bondsman as part of that administration.¹⁷

One truth in this statement is that abuses in bondsmen's operations rarely surface with enough visibility to permit complete analysis. When the rare occasion arises, the state or city usually begins, or adds to, its list of bondsmen's activities declared criminal and the purity of the bail system is theoretically restored. For example, Tennessee has declared the fixing of cases by bondsmen to be a criminal act.¹⁸ The Uniform Bail Bondsmen Licensing Act, adopted now by at least seven states,¹⁹ has a list of seven acts deemed criminal and a stack of *peccata* for which a bondsman may suffer a loss of license.²⁰ Recently the alleged brutality of tracers hired by a Columbus, Ohio, bondsman to retrieve an accused was highly publicized²¹ with the predictable consequence that an antidotal bill is currently before the Ohio legislature which prohibits the use of force by bondsmen.²² Michigan prohibits the exchange or receipt of money or property between bondsmen and attorneys or court clerks for purposes of obtaining bail bond business.²³

In spite of all the criticism of bondsmen, they remain the central actors in nearly all state bail systems.²⁴ This is true because of the contention that fees paid by individual defendants to bondsmen purchase for society a private, highly efficient group of custodians of released defendants and re-

¹⁶ See, e.g., Christian Science Monitor, May 24, 1967, at 5, cols. 1-5; *id.* at 6, cols. 1-3; Cincinnati Enquirer, Jan. 21, 1962, at 1, cols. 1-4; *id.* Jan. 22, 1962, at 1, cols. 3-8; *id.* Jan. 23, 1962, at 1, cols. 1-8; *id.*, Jan. 24, 1967, at 1, cols. 1-6. See generally D. FREED & P. WALD, BAIL IN THE UNITED STATES 34-35 (1964).

¹⁷ Sweet, *Bail or Jail*, 19 RECORD OF N.Y.C.B.A. 11, 18 (1964).

¹⁸ TENN. CODE ANN. § 40-1409 to 1411 (1955).

¹⁹ COLO. REV. STAT. ANN. §§ 72-20-1 to -10 (1963), as amended (Supp. 1965); FLA. STAT. ANN. §§ 648.25-57 (Supp. 1971); IND. ANN. STAT. §§ 9-3701 to 3738 (Supp. 1970); KY. REV. STAT. ANN. §§ 304.30-010 to -140 (1969); N.C. GEN. STAT. §§ 85A-1 to 34 (1965); OKLA. STAT. ANN. tit. 59, §§ 1301-40 (1971); S.D. COMP. LAWS ANN. 958-22 (1967).

²⁰ Uniform Act, *supra* note 11, at §§ 308, 401.

²¹ Columbus Dispatch, July 28, 1970, at 1B, cols. 2-5; *id.*, July 29, 1970, at 8A, col. 3.

²² H.B. 777, 109th Ohio Gen. Assembly, Reg. Sess. 1971-1972.

²³ MICH. COMP. LAWS § 750.167(b) (1969).

²⁴ Murphy, *State Control of the Operation of Professional Bail Bondsmen*, 36 U. CIN. L. REV. 375, 400-401 (1967).

trieving hunters of fugitive defendants—and all this without cost to society. It seems minimally necessary for reformers of state bail systems to examine this contention and balance the advantages and disadvantages to the administration of state criminal justice resulting from a state bail system dependent upon bondsmen.

The last extensive study on the scope of control by bondsmen over state bail systems was completed late in 1966 by the American Bar Foundation.²⁵ Although a few states have revised their bail laws since 1966,²⁶ the statistics released in the study continue to be an impressive record of the tight control bondsmen exercise over state bail systems. For example, the study reported on bondsmen's activities in sections of Ohio—a state which has not revised its bail laws since the study's publication.²⁷ Bondsmen effectuated seventy-eight percent of the releases in Columbus, Ohio, and sixty percent in Cincinnati.²⁸ Another study in 1967 showed similar results in the participation of bondsmen in the Cincinnati criminal process.²⁹ Bondsmen strikes in New York in 1964 demonstrated the power of bondsmen over that state's bail system.³⁰ Tight enforcement policies on forfeitures led to refusals to write bonds except on one-hundred per cent collateral. The strike resulted in jailing numerous offenders and overcrowding the city's prisons.³¹

For each defendant released through the services of a bondsman, criminal justice administered to him usually costs a fee to a bondsman and a fee for legal representation. The theory, of course, is that the fees paid by defendants to bondsmen purchase for society a custodial and retrieval function. Within the handful of reported cases on bondsmen's operations, the proposition emerges that the bondsmen's interest in the release of a defendant is predominantly financial. This point seems obvious, but it carries with it a corollary: if that interest can be served by means other than retrieving and surrendering the fugitive defendant, then the bondsman usually makes no effort to satisfy the state's interest in the defendant's appearance for trial.³²

²⁵ Silverstein, *Bail in the State Courts—A Field Study and Report*, 50 MINN. L. REV. 621 (1966) Appendix I, at 647-52.

²⁶ *Supra* note 2.

²⁷ Through its Criminal Rules Advisory Committee, the Ohio Supreme Court is considering revision of procedural rules in criminal cases, including bail.

²⁸ Silverstein, *supra* note 25 at 650.

²⁹ Murphy, *State Control of the Operation of Professional Bail Bondsmen*, 36 U. CIN. L. REV. 375, 379 (1967).

³⁰ D. FREED & P. WALD, *BAIL IN THE UNITED STATES* 27 (1964).

³¹ *Id.* at 28.

³² In Note, *Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964), there is a report of interviews with bondsmen in which the bondsmen state that some of their colleagues pursue bail-jumpers even where adequate security has been given by a third-party indemnitor "in order to maintain a reputation for relentless pursuit as a general psychological deterrent to flight." *Id.* at 1106 n. 40.

This is demonstrated by the facts found in *McCaleb v. Peerless Insurance Co.*,³³ a recent case where a bondsman actually ordered a defendant to leave Nebraska one hour in advance of the defendant's appearance time before an Omaha Municipal Court on traffic charges. Bail was set in the amount of two-hundred dollars, and McCaleb purchased a bail bond from a bondsman acting as agent for Peerless Insurance Co. without collateral or a co-signing obligor. The bonding company discovered that McCaleb left Omaha and was residing in California with relatives. A bonding agent went to California, arrested McCaleb, gained control of McCaleb's car, and for approximately four days took McCaleb on a series of trips throughout California. McCaleb was placed in prisons at night, and at all other times was shackled around his waist and wrists.³⁴

The purpose of these trips in California was to demand security for the two-hundred dollars bond and payment of costs of retrieval from McCaleb's relatives. These demands were unsuccessful and costs were increasing; consequently, the bonding agent went back to Omaha with McCaleb in McCaleb's car. The reason for the bondsman's retrieval efforts became clear once the bondsman and the shackled McCaleb arrived in Omaha. The bondsman promptly had McCaleb execute a bill of sale to his one-year old car and sign a release of all claims. McCaleb was released from custody and told to leave Nebraska. The bondsman never surrendered McCaleb to the Court.³⁵

The issue raised in the case was the propriety of the four day detention and shackling of McCaleb under a federal civil rights statute.³⁶ Without minimizing the importance of this issue, the facts clearly demonstrate that the purpose of the arrest and detention of the fugitive McCaleb by the bondsman was not to satisfy the state's interest in exposing McCaleb to the criminal process, but rather for the advancement of the bondsman's interest in financial protection from loss on the bond. In spite of claims by some bondsmen to the contrary,³⁷ it can reasonably be concluded that in any case where a bondsman's financial interest in a bail bond is protected in advance by the signature of a reachable co-signing obligor or by collateral, the state's interest in the appearance of the defendant counts little.

The *McCaleb* case is one of the few published judicial records of the touted custodial and retrieval functions by a bondsman. It is quite reasonable to assume, however, that in a large number of releases effectuated by bondsmen, the bondsmen's interest in financial self-protection and the state's interest in the defendant's appearance do support each other. This

³³ 250 F. Supp. 512 (D. Neb. 1965).

³⁴ *Id.* at 514.

³⁵ *Id.* at 515.

³⁶ 42 U.S.C.A. § 1983; see text *infra* at pp 459-462 for a discussion of this issue.

³⁷ See note 32 *supra*.

is demonstrated by releases where, in contrast with the *McCaleb* case, neither full collateral nor a co-signing obligor is obtained before the appearance time of the defendant. In these cases, surrendering the defendant to court is a method by which the bondsman can exonerate himself of his financial obligation as surety on the bailbond or obtain a remission of an outstanding judgment on a forfeited bond. The state's interest in the appearance of the defendant is reinforced by the bondsmen's interest in financial self-protection. This leads to a kind of "bounty-hunter" mythology that supports the retention of bondsmen³⁸ and which is detailed by bondsmen when threatened by proposed legislation. One bondsman described his manhunting capacity in this way:

In fact, we must locate the man. We do the tracking down. And there is a lot to be done. We have monthly publications which go to all police departments, all sheriff's offices. We run the man down.³⁹

In addition to the *McCaleb* case, examples of the bondsmen's procedures in "running the man down" have appeared in two other recent cases. In *Shine v. State*,⁴⁰ a "pistol-type" shotgun with an 18-inch barrel was used in an attempt to retrieve a misdemeanant who had been sentenced by a state court to pay a one-hundred dollar fine and costs. The purpose of the retrieval was to exonerate the bondsman on an one-hundred dollar appeal bond. In *United States v. Trunko*,⁴¹ two bondsmen entered a house in the middle of the night, forced their way into the room where the fugitive defendant, his wife and children were sleeping, displayed a gun, and retrieved the defendant. The fugitive defendant had been charged with traffic offenses.

The basic issue is whether the state's interest in ensuring the appearance of defendants is well served through dependence upon a private retrieval system of bondsmen. The relevant factors are: (1) the presence or absence of controls over the procedures used in a private retrieval system; (2) the financial cost to defendants in the criminal process to support the system; and, (3) the acid factor, experience in state bail systems operating without the retrieval system of bondsmen.

III. THE ABSENCE OF ACCOUNTABILITY IN THE PRIVATE RETRIEVAL SYSTEM OF BONDSMEN

A. *Source of Bondsmen's Power to Arrest*

Most states by statute or court rule declare that the bondsman has the power to arrest the defendant released on bail bond purchased from the

³⁸ D. FREED & P. WALD, BAIL IN THE UNITED STATES 30-31 (1964).

³⁹ Hearings, *supra* note 6, at 181.

⁴⁰ 204 So. 2d 817 (Ala. 1967).

⁴¹ 189 F. Supp. 559 (E.D. Ark. 1960).

bondsman and to surrender the defendant to custody of the sheriff or other law enforcement officer.⁴² The arrest and surrender of the defendant can be for the purpose of the bondsman's exoneration on a bond prior to the court appearance time of the defendant or for remission of judgment on a forfeited bond.⁴³

These statutes and rules essentially repeat the common law retrieval power of bondsmen prevailing prior to their adoption.⁴⁴ *Taylor v. Taintor*,⁴⁵ an 1873 decision, contains dicta which describes the common law power of bondsmen:

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed.⁴⁶

This extraordinary power in the bondsmen is not derived from any state power over the accused; rather, it arises from the private contractual relationship between the accused and the bondsman as surety on the bail bond contract. *Fitzpatrick v. Williams*⁴⁷ discussed the issue of the bondsman's right to seize a fugitive defendant in Louisiana and to transport him to Washington, the state from which the accused had fled. The accused was arrested in New Orleans on affidavits charging him with having committed an offense in Washington and with being a fugitive from justice. The charges were dismissed by the New Orleans court but before the accused was released from the custody of the sheriff, the Washington bondsman intervened⁴⁸ and demanded custody of the accused. The court agreed with the bondsman and repeated the proposition that the bondsman's right is derived from his private relationship with the accused and is not derived by subrogation to the rights of the state. The court said that this right to arrest, imprison, and transport the accused can be exercised without resort to legal process. The bondsman can exercise this right wherever he finds

⁴² See Appendix I for a compilation of the bondsmen's statutory power to arrest.

⁴³ See, e.g., FLA. STAT. ANN. §§ 903.22, 903.26(5)(d) (Supp. 1971-72).

⁴⁴ The court in *Cartee v. State*, 162 Miss. 263 (1932), speaking of the statutes setting forth the bondsmen's power to arrest, said, "These sections are, in substance, declaratory of the common law." *Id.* at 272.

⁴⁵ *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366 (1873).

⁴⁶ *Id.* at 371.

⁴⁷ 46 F.2d 40 (5th Cir. 1931).

⁴⁸ The procedure in *Fitzpatrick* is unclear. Apparently the defendant sought a writ of habeas corpus in a federal district court after charges had been dismissed by the state court, and the state sheriff refused to release the defendant. The bondsmen intervened in the hearing on whether the writ should issue.

the accused needing ". . . no process, judicial or administrative, to seize [the accused]" ⁴⁹

The court concluded its description of the absence of judicial or administrative control over the bondsman's power to arrest, imprison, and transport an accused over state lines by comparing this power with that of the state. Predictably, the state placed second to the bondsmen. The state must go through extradition procedures—but not the bondsmen.

The right of the surety to recapture his principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond. . . . It is not a right of the state but of the surety. If the state desires to reclaim a fugitive from its justice, in another jurisdiction, it must proceed by way of extradition in default of a voluntary return. ⁵⁰

B. *Legality of Bondsman's Arrest and Detention Power*

The arrest and custody power of bondsmen is a degenerate vestige of a bail relationship between defendant and surety that either perished or never gained footing in this country. Bail was a transfer of custody of a defendant awaiting trial from the sheriff to a third party who had a personal, not a pecuniary, interest in the defendant. ⁵¹ The emphasis was on the personal stake of the third party in the interests of the defendant and the actual custodial efforts of the third party. It was a system based on trust and confidence rather than commercialism. The closest present day analogy would be a release of a defendant to the custody of his family, or a social agency, where this form of bail is authorized by state law. ⁵² Emphasis on a personal rather than commercial relationship between the defendant and third party continues to have vitality in England. The furnishing of bail for profit is illegal and there are no professional bail bondsmen in England. Agreements to indemnify the third party for any payment he must make to the court caused by the non-appearance of the defendant are illegal. ⁵³

The states have capitulated to bail systems where the interest of the third party in producing the defendant can be, and often is, profit only. Contracts to indemnify the third party for losses caused by the failure of

⁴⁹ *Fitzpatrick v. Williams*, 46 F.2d 40, 41 (5th Cir. 1931).

⁵⁰ *Id.* at 40.

⁵¹ F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 589-90 (2d ed. 1968); Note, *Bail: An Ancient Practice Reexamined*, 70 *YALE L.J.* 966 (1961). "Bail originated with the practice of releasing the defendant in the custody of his family or friends, who undertook to guarantee his court appearance. They generally minimized their risk by acting as private jailers." *Arez & Sturz, Bail and the Indigent Accused*, 8 *CRIME AND DELINQUENCY* 12, 13 (1962).

⁵² *ALASKA STAT.* § 12.30.020(b)(1) (Supp. 1970).

⁵³ Nat'l Conference on Bail and Criminal Justice, *PROCEEDINGS* 339-40 (1964); see Note, *Indemnification Contracts in the Law of Bail*, 35 *VA. L. REV.* 496, 497-500 (1949).

the defendant to appear have been held valid.⁵⁴ One dissenting judge in *Carr v. Davis*,⁵⁵ a West Virginia case holding valid a contract to indemnify the bondsman, stated clearly the shift of bail in the states from a system of actual custody and control based upon a personal relationship between the defendant and the third party to one based upon impersonal, financial interests.

Public policy and the law demand a different decision. . . . The richest man, for whom those knowing him would not vouch without indemnity, should not be allowed to furnish bail by virtually purchasing it. The mere fact that indemnity is furnished indicates that confidence is not reposed. Bail is a matter of confidence and personal relation.⁵⁶

In addition to the disappearance of any personal relationship between the defendant and the surety-for-profit, the assumed custodial efforts and dominion by the surety-for-profit over the defendant during the period of the release are simply non-existent. The theory that a bail release is a continuation of the defendant's original imprisonment, as stated in the *Taylor* case,⁵⁷ is based on the assumption that the surety will take a personal interest in the behavior and appearance obligation of the released defendant. This is not so. Caleb Foote, who has added much to the understanding of bail law by empirical studies,⁵⁸ calls bondsmen's claims to any significant custodial services "frivolous."⁵⁹ The number of persons released on bail through the services of bondsmen is too great to permit any extensive custodial efforts by bondsmen,⁶⁰ and the only extensive study of the practices of bondsmen found that their custodial efforts are limited to "an occasional phone call, letter, or 'grapevine' rumor."⁶¹

The dissenting judge in *Carr* failed to point to the most intolerable consequence of the passing of bail as a matter of actual dominion and personal relation to that of commercialism. The power of the third party to arrest and detain has continued and when now executed by a bondsman serves his commercial interest. The professional bail bondsmen, by defini-

⁵⁴ See, e.g., *Leary v. United States*, 224 U.S. 567 (1912). Louisiana, one of the last hold-outs for the invalidity of indemnification contracts, changed its mind by statute in 1966. LA. CODE CRIM. PRO. ANN. art., 332 (West. 1966).

⁵⁵ 64 W. Va. 522, 63 S.E. 326 (1908).

⁵⁶ *Id.* at 535, 63 S.E. at 331 (dissenting opinion).

⁵⁷ See text *supra* at 458.

⁵⁸ Foote, *Introduction: The Comparative Study of Conditional Release*, 108 U. PA. L. REV. 290 (1960); Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954). See also Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1162 (1965).

⁵⁹ "The claims that bondsmen provide any significant function in policing those on bail and finding them once they have absconded seem frivolous to me. There is no evidence that they actually perform any significant custodial function, and it is unreasonable to expect them to do so." Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1162 (1965).

⁶⁰ Foote, *Introduction: Comparative Study of Conditional Release*, 108 U. PA. L. REV. 290, 300 (1960).

⁶¹ D. FREED & P. WALD, *BAIL IN THE UNITED STATES* 32 (1964).

tion, provides bail for a fee.⁶² His relationship, as commercial surety, with the defendant as principal obligor on the bail bond, is essentially that of a creditor to debtor.

In a recent case, where bondsmen's activities surfaced for judicial scrutiny, the bondsman was found by the court to have used his arrest and detention powers to collect a private debt of forty dollars owed by the defendant.⁶³ In this case, the defendant had purchased an appearance bond from the bondsman, appeared at trial, was convicted of a misdemeanor and sentenced to pay a one-hundred dollar fine and costs of nineteen dollars. The bondsman paid the fine and costs and then sold an appeal bond to the defendant. The defendant paid some money to the bondsman, leaving a debt of forty dollars. The court found that the bondsman took the following steps to collect his forty dollars. The bondsman and two armed agents went to their debtor's home at 5:00 a.m., displayed guns to the debtor, surrounded the home, and started to kick at the back and front doors. The front door broke, and the bondsman's agent thrust his shotgun through it. At that point, the debtor shot and killed the agent. Shine, the debtor, was arrested and charged with second-degree murder on affidavit of the bondsman which recited the Alabama statutory authority of bondsmen to arrest. Shine was convicted and sentenced to 15 years imprisonment. The appellate court reversed, noting that, "[T]his 'pay or get shot' attitude has too long been allowed to flourish with bonding companies."⁶⁴ Concerning the state statutory arrest and detention power of bondsmen, the court held that the purpose of this law was not to aid in the collection of private debts of the bonding company no matter what the origin of the debt.

The Code cannot and must not be construed to license company officials to run around the countryside armed with . . . shotguns and pistols, in an effort to collect their personal debts The proper procedure for enforcing collection of a debt is not by means of an armed posse descending upon the debtor at 5:00 a.m. in his own domicile.⁶⁵

The *McCaleb* case, which was discussed earlier,⁶⁶ is an astounding example of a bondsman using his power to arrest, shackle, and detain a defendant for four days to serve only the bondsman's financial interest in a bail bond. Once the bondsman satisfied his commercial interest through his state-bestowed power to arrest and detain, the defendant was released and told not to appear at court.

⁶² The terms "bondsmen" and "professional bail bondsmen" are used interchangeably in this Article and refer to a person who provides bail for a fee by using his own assets or by acting as an agent for a surety company.

⁶³ *Shine v. State*, 204 So. 2d 817 (Ct. App. Ala. 1967).

⁶⁴ *Id.* at 826.

⁶⁵ *Id.*

⁶⁶ See text *supra*, at 456.

The above discussion is relevant to the question which is basic to the revision of state bail bond law: should compensated sureties be continued in the state bail system? The American Bar Association's *minimum standards for criminal justice*, approved in 1968 by the House of Delegates, recommended, without qualification, the prohibition of compensated sureties.⁶⁷ The A.B.A. also urges adoption of a rule that in any action to enforce an indemnity agreement between a principal and a surety on a bail bond, it should be a complete defense that the surety acted for compensation.⁶⁸ The A.B.A.'s position is that the professional bail bondsman is an anachronism in the state criminal process and is an intolerable threat to civil liberties. The A.B.A. believes that the state's interest in the appearance of the defendant can be served by other forms of bail, such as the ten percent cash deposit.⁶⁹

C. *Bondsmen's Power To Execute Distant Retrievals*

Apart from the legislative question of whether commercial sureties should be prohibited in the criminal process, or phased out through the development of other forms of bail not requiring commercial sureties, such as ten percent deposit, one frequently occurring application of the law authorizing bondsmen to arrest and detain seems to be constitutionally invalid. The factual situation in which this problem arises is the bondsman's arrest of a defendant leading to a lengthy detention and transportation over great distances from the place of the arrest to the place of surrender. Arrest and distant transportation occurred in the facts of many of the cases that discuss bondsmen's operations. *United States v. Trunko*⁷⁰ involved arrest and transportation from Arkansas to Ohio; *McCaleb*, California to Nebraska; *Fitzpatrick*, Louisiana to Washington; *Thomas v. Miller*,⁷¹ Cincinnati to Tennessee; *Gola v. State*,⁷² Pennsylvania to Delaware. A recent distant retrieval from West Virginia to Ohio received considerable newspaper publicity because of alleged brutality by the bondsmen in the course of transportation.⁷³

The difficulty in these distant retrievals is the absence of any required initial limited hearing to protect individuals from the expense and consequential hardship of being forcibly transported great distances when there is a mistake in identity, or when the accusation of criminal conduct is patently frivolous or mistaken. Furthermore, there is no initial protection

⁶⁷ ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, § 5.4 (1968).

⁶⁸ *Id.*

⁶⁹ *Id.* at 64-65.

⁷⁰ 189 F. Supp. 559 (E.D. Ark. 1960); see also cases cited at Annot., 73 A.L.R. 1370 (1931).

⁷¹ 282 F. Supp. 571 (E.D. Tenn. 1968).

⁷² 135 A.2d 137 (Del. 1957).

⁷³ Columbus Dispatch, *supra* note 21.

from the bondsman's use of his power to arrest and transport for purposes other than court appearance.⁷⁴ That there is need for this type of limited hearing is demonstrated by the recent cases where courts have found that bondsmen used their arrest and transportation power for purposes other than production of defendants in court. With the exception of California,⁷⁵ no state appears to require any judicial or administrative process during the course of a retrieval by a bondsman. There has been one suggestion⁷⁶ for amelioration of this problem in distant retrievals by bondsmen through application of the formal procedures of the Uniform Criminal Extradition Act⁷⁷ for arrests and interstate transportation of defendants by bondsmen, but there is no evidence of acceptance of this suggestion by any state.

The requirement of an initial limited hearing was raised in 1957 in a Delaware case⁷⁸ but the theory required to support this requirement missed the mark. The case arose on a petition for a writ of habeas corpus by a Delaware state prisoner in a state court alleging that he had been illegally transported to Delaware from Pennsylvania because he had not waived extradition nor had extradition been sought by Delaware. The court called the prisoner's claim "fanciful" and lacking in "even a fairly debatable point of argument,"⁷⁹ and held that no extradition was necessary since the arrest in Pennsylvania was by agents of his bondsmen. According to the court, such an arrest was not an action by the state and, therefore, no extradition was required. The facts of the arrest in Pennsylvania suggest that the petitioner's claim was not as fanciful as the court claimed. The arrest in Pennsylvania was by two Delaware police officers acting as agents of a Delaware bondsman. The extent to which the police officers used symbols of their office to obtain custody of the petitioner is not stated in the opinion, but this point might have been developed to show that the arrest was by the bondsmen's agents acting under color of Delaware law.⁸⁰

The argument of the petitioner was quite understandable when the power of bondsmen to arrest and transport defendants over great distances is compared with that of federal and state law enforcement agencies. Arrest and removal of a defendant by federal agents to a distant district for trial is controlled by Rule 40 of the Federal Rules of Criminal Procedure. The rule applies generally to cases where the arrest would result in trans-

⁷⁴ *Shine v. State*, 204 So.2d 817 (Ct. App. Ala. 1967). *McCaleb v. Peerless Ins. Co.*, 250 F. Supp. 512 (D. Neb. 1965).

⁷⁵ CAL. PENAL CODE 847.5 (1970).

⁷⁶ Note, *Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964).

⁷⁷ Uniform Criminal Extradition Act, 9 U.L.A. 263 (1957).

⁷⁸ *Golla v. Delaware*, 50 Del. 497, 135 A.2d 137 (1957).

⁷⁹ *Id.* at 501, 135 A.2d at 139.

⁸⁰ See, e.g., *United States v. Trunko*, 189 F. Supp. 559 (E.D. Ark. 1960) where the court found arrest action by bondsman was under color of state law when bondsman showed his Ohio Deputy Sheriff's badge to effectuate the arrest.

porting the defendant more than one hundred miles to the point of trial.⁸¹ In such cases, the rule requires that federal arresting officers take the defendant "without unnecessary delay" to the nearest available magistrate or judge in the district in which the arrest occurs for a hearing on whether an order should issue authorizing the distant removal or discharge of the defendant. The issues at the hearing are quite limited; if the removal is based upon an indictment, the federal government need only produce a certified copy of the indictment and proof of identity. If the removal is based only upon a complaint or information, reasonable cause to believe the defendant guilty must be adduced.⁸²

The drafters of Rule 40 recognized that it seemed illogical to require an extradition-type procedure to remove a fugitive from one federal district to a distant one, since the entire United States is a single jurisdiction from the point of view of the Federal Government,⁸³ and a federal arrest warrant runs through the United States.⁸⁴ But it was felt that "... in view of the long distances that are at times involved, some supervision and restrictions seem desirable on the transportation of an accused person from one part of the country to another."⁸⁵ The minimal hearing prevents cost and burden of distant transportation upon an individual where the charge against him is frivolous or mistaken, or where he is not the person against whom the charge was made.

Although the Rules are applicable to "all criminal proceedings"⁸⁶ in federal courts, no reported judicial decision has discussed the applicability of the minimal removal hearings in Rule 40 to transportation by bondsmen of defendants over great distances to a federal district court for trial. The practice of bondsmen is to ignore Rule 40 in conducting distant removals in federal criminal matters.⁸⁷ What the law says is minimally necessary for federal law enforcement officers engaged in distant removals does not apply to similarly occupied bondsmen.

Bondsmen acting on the express or implied⁸⁸ authority of a bail con-

⁸¹ For a statement of the scope of Rule 40, see 8 A. J. MOORE, *FEDERAL PRACTICE* § 40.01 at 40-4 (2d ed. 1967).

⁸² "[T]he distinction reflects the fact that in the case of an indictment, the grand jury, an independent body, 'which is an arm of the court,' has already found probable cause. . . . In the case of a complaint or information, no such determination has been made and, therefore, separate proof of reasonable cause is required. In either case, the defendant is entitled to a judicial hearing in the asylum district." Note, *Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 *YALE L.J.* 1098, 1104 n. 30 (1964).

⁸³ Holtzoff, *Reform of Federal Criminal Procedure*, 3 *F.R.D.* 445, 450 (1944).

⁸⁴ *FED. R. CRIM. P.* 4(c)(2) see 8 MOORE, *FEDERAL PRACTICE* § 4.04[3], at 4-20 (1970).

⁸⁵ Holtzoff, *Reform of Federal Criminal Procedure*, 12 *GEO. WASH. L. REV.* 119, 128 (1944). Prof. Holtzoff was Secretary of the Advisory Committee on Federal Rules of Criminal Procedure that drafted Rule 40.

⁸⁶ *FED. R. CRIM. P.* 1.

⁸⁷ Interview with Judge Max Schiffman, Magistrate, Federal District Court for Eastern District of New York.

⁸⁸ In *Fitzpatrick v. Williams*, 46 *F.2d* 40 (5th Cir. 1931) the bondsmen's power to arrest

tract are also largely immune from judicial control in interstate removal of individuals accused of state crimes.⁸⁹ By comparison, state officers, visibly acting under the authority of the state, are bound by the Uniform Extradition Act which has been adopted by all but four states.⁹⁰ The Act requires a removal hearing limited to issues similar to Rule 40 of the Federal Rules of Criminal Procedure. In addition to the social goal of interstate harmony, state extradition laws do protect against improvident distant removals based on mistake or insubstantial grounds.⁹¹ Although official kidnapping by state police officers was reported two decades ago,⁹² state law enforcement officers presently do seem to comply with the extradition statutes.⁹³

To place the same responsibility on bondsmen that currently applies to federal and state officers in distant retrievals does not require that Rule 40 of the Federal Rules of Criminal Procedure and the Uniform Extradition Act be held applicable to arrests and distant removals by bondsmen through process of rule or statutory interpretation. The minimum procedural requirements of the fourteenth amendment of the federal Constitution should apply to arrests and distant removals by bondsmen. Consequently, defendants should have a constitutional right to a limited hearing prior to distant removals to guard against the costs and burdens to defendants caused by overreaching bondsmen, mistakes in identity and removals based on insubstantial charges. The basis of this theory is that retrieval of defendants for trial by bondsmen is action by the state, in view of the public function performed by bondsmen and state participation in bondsmen's retrieval activities. In addition, the interest of the defendant in guarding against the consequences of an improvident distant removal is cognizable under the fourteenth amendment through the requirement of a hearing limited in scope to appropriate protection of that interest.

The necessity of a hearing is supported by *Goldberg v. Kelly*,⁹⁴ and *Bell*

and cross state lines was based upon an implied promise on the part of the defendant not to leave the state where the bail bond was written.

⁸⁹ Note, *Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 YALE L.J. 1098, 1100 (1964).

⁹⁰ See 9 U.L.A. 143 (Cum. Ann. Pocket Part 1967) for a list of states that have adopted the Uniform Extradition since 1967. Louisiana and Nevada adopted the Act since 1967 leaving only Mississippi, North Dakota, South Carolina and Washington as the four remaining states that have not adopted the Act. As an alternative to bondsmen's distant retrievals without hearings, The Uniform Rendition of Accused Persons Act, adopted by two states, permits the pursuing state to bypass extradition by obtaining a court order directing immediate return of the accused. See Commissioners on Uniform State Laws, 1967 HANDBOOK 153 (1967).

⁹¹ *Ex parte Parker*, 390 S.W.2d 774 (Tex. Ct. App. 1965); *State ex rel. Foster v. Uttech*, 31 Wis.2d 664, 143 N.W.2d 500 (1966), *cert. denied*, 385 U.S. 956; see *United States ex rel. McCline v. Meyering*, 75 F.2d 716 (7th Cir. 1934).

⁹² See *Frisbie v. Collins*, 342 U.S. 519 (1952); Note, *Illegal Abductions by State Police: Sanctions for Evasion of Extradition Statutes*, 61 YALE L.J. 445, 448 (1952).

⁹³ Note, *Bailbondsmen and the Fugitive Accused—The Need For Formal Removal Procedures*, 73 YALE L.J. 1098, 1100 n.16 (1964).

⁹⁴ 397 U.S. 254 (1970).

v. Burson,⁹⁵ two recent Supreme Court decisions requiring limited hearings prior to a license suspension of an uninsured driver involved in an accident and prior to the termination or reduction of public assistance. In both cases the court stressed the unfortunate practical consequences to the driver or welfare recipient of a loss of license or welfare caused by mistake or action based on insubstantial grounds.

The argument that bondsmen act as private agents and that their arrest and detention powers are based exclusively on a bail contract with the defendant, honors form and ignores substance. The bondsmen occupy an essential role in the criminal processes of most states and their activities intertwine with the state interest in pre-trial release and appearance of defendants. In the arrest and return of a fugitive defendant, the bondsman operates as a *de facto* agent of the state in that the purpose of his pursuit, the arrest and transportation of the defendant, is to expose the defendant to the state criminal process.⁹⁶ This is identical to the goal of state police officers involved in retrieval of fugitive defendants or interstate retrieval through extradition procedures.

The Supreme Court has, in two major cases,⁹⁷ held that under some circumstances private activity may, at least for fourteenth amendment purposes, be treated as state activity where the private activity is satisfying a public function. One case involved pamphleteering in a company owned town⁹⁸ and the other, picketing on a porch and parcel zone of a supermarket.⁹⁹ The actions of the company town and supermarket in prohibiting the pamphleteering and picketing were found to be subject to proscriptions of the first amendment applied through the fourteenth amendment against state interference with speech. Countervailing in both cases against the application of the fourteenth amendment was the argument that the company town and supermarket were exercising through their trespass actions one of the major incidents of private property ownership—the right to tell others to stay off their property. The private interests of the bondsmen is far less weighty. It arises out of a bail bond contract where the obligation of the obligor-defendant and the bondsman-surety is owed to the state and the core of the bargain is exposure of the defendant to the criminal processes of the state.

It is true that an individual bondsman in one distant retrieval case

⁹⁵ 39 U.S.L.W. 4607 (U.S. May 14, 1971).

⁹⁶ This theory has been expressed for purposes of applying the Uniform Extradition Act to distant retrievals by bondsmen and not for purposes of applying the Fourteenth Amendment. Note, *Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964).

⁹⁷ *Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgam. Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

⁹⁸ *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁹⁹ *Amalgam. Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

weighs little quantitatively in the total exercise of the state interest in the production of defendants. But the measurement of state action in any case of arrest and detention by bondsmen should include the extensive control the professional bail bonding interest exerts in state criminal processes.¹⁰⁰ Added to the public function performed by bondsmen which shows the application of the fourteenth amendment, is the participation¹⁰¹ by the state in the retrieval activities of the bondsmen. City or state prisons are used by bondsmen as hostels for their captives during periods of distant transportation. For example in *McCaleb v. Peerless Insurance Co.*¹⁰² the bondsman housed his captive in jails when necessary during their four day trip through California and finally to Nebraska. This is a usual practice of bondsmen as demonstrated by the cases on bondsmen's operations and its source lies in the common law powers of bondsmen to imprison defendants in the course of retrieval.

D. *Absence of Remedy for Illegal Seizure, Detention or Force by Bondsmen*

The difficulty of obtaining a remedy for an illegal seizure and distant removal by bondsmen is another sign of the lack of accountability within which bondsmen operate. The rule has been that an illegal seizure of the accused does not provide a basis for objecting to the state's jurisdiction in a subsequent criminal trial.¹⁰³ The rule has been criticized by commentators¹⁰⁴ because it does not operate to deter illegal activity, but the criticism has not found its way, as yet, into the cases. One approach is the application of the Federal Kidnapping Act,¹⁰⁵ which prohibits the interstate transportation of illegally seized persons. But even the federal government has been unsuccessful in its one attempt to apply a criminal sanction to bondsmen's activities found by the court to be "high-handed, unreasonable and oppressive."¹⁰⁶

According to the court, two Ohio bondsmen burst through the door of a home in Arkansas before dawn one morning, pushed by the eighty-one-year-old homeowner and entered a bedroom occupied by a man, his wife and baby, flashing a light in the eyes of the man—the sleeping object of their interstate search. The bondsmen displayed a gun, forced the man into an automobile, handcuffed him, and drove away at a terrific rate of

¹⁰⁰ In the *Amalgam. Food* case, the court set out the extensive control (37%) over retail sales exercised by supermarkets as relevant to the state action issue. *Id.* at 324.

¹⁰¹ One of the lead cases on "state participation" as a factor bearing on the state action issue is *Evans v. Newton*, 382 U.S. 296 (1966).

¹⁰² 250 F. Supp. 512 (D. Neb. 1965).

¹⁰³ *Frisbie v. Collins*, 342 U.S. 519 (1952).

¹⁰⁴ See, e.g., Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 CALIF. L. REV. 579, 600 (1968).

¹⁰⁵ 18 U.S.C. § 1201 (1964).

¹⁰⁶ *United States v. Trunko*, 189 F. Supp. 559, 565 (E.D. Ark. 1960).

speed to Ohio, ignoring the pleas of their prisoner's wife to communicate with the sheriff of the local county in Arkansas. All of this was done to secure the remission of a five hundred dollar misdemeanor bond.¹⁰⁷

The federal government prosecuted the bondsmen for willfully depriving the man, under color of state law, of his right not to be deprived of his liberty without due process—the criminal counterpart¹⁰⁸ of the federal civil rights statute. The court found that the activities of the bondsmen violated the man's constitutional right and that these activities were performed under color of state law.¹⁰⁹ But the prosecution's case faltered on the proposition that the bondsmen did not have the specific criminal intent to violate constitutional rights and as support the court cited the bondsmen's testimony that a "bond jumper" had no civil rights during arrest and return.¹¹⁰

A similar action, but civil in theory, based upon a federal civil rights statute¹¹¹ involved the automobile transportation of a fugitive from Cincinnati to Tennessee. The fugitive's legs were chained, his hands handcuffed, and the court stated that he had been treated "roughly, if not cruelly."¹¹² But again, the bondsmen were held not to be civilly liable because they "were acting by reason of a contractual relationship with him [the fugitive]."¹¹³ Both cases suggested state tort actions against the bondsmen. "If plaintiff has a right of action for cruel and inhuman treatment against . . . his bonding company, it is a state court action."¹¹⁴ This is a hollow suggestion in that, with one exception;¹¹⁵ no recent case has been reported where a bondsman has been sued successfully under any civil theory for recovery against oppressive activities in retrieving individuals.

It is fair to conclude that there is no system of accountability in bondsmen's arrest and detention activities, and there are no clear rules on the amount of force bondsmen may use during the course of an arrest and detention of a fugitive. The bondsman's immunity to legal processes, permitting him to pursue his commercial interests in the bail bond contract, is truly startling when compared with the settled rules restricting activities

¹⁰⁷ *Id.*

¹⁰⁸ 18 U.S.C. § 242 (1964).

¹⁰⁹ The conclusion that the activities were under color of state law was decided on the narrow facts that one of the bondsmen held a deputy sheriff commission in Ohio and that he displayed his badge to the man at the time of the arrest. *United States v. Trunko*, 189 F. Supp. 559, 562 (E.D. Ark. 1960).

¹¹⁰ *United States v. Trunko*, 189 F. Supp. 559, 565 (E.D. Ark. 1960).

¹¹¹ *Thomas v. Miller*, 282 F. Supp. 571 (E.D. Tenn. 1968).

¹¹² *Id.* at 572.

¹¹³ *Id.* at 573.

¹¹⁴ *Id.* at 572.

¹¹⁵ *McCaleb v. Peerless Ins. Co.*, 250 F. Supp. 512 (D. Neb. 1965). One court denied a motion by a bondsman to dismiss a complaint under 42 U.S.C.A. § 1983 brought by an accused for an alleged beating by the bondsman during a retrieval, *Hill v. Toll*, 320 F. Supp. 185 (E.D. Pa. 1970).

of police officers in conducting arrests, retrieving defendants after arrest, and retrieving fugitives after prison escapes. In arresting a misdemeanant,¹¹⁶ or retrieving a misdemeanant after arrest¹¹⁷ or prison break,¹¹⁸ the officer may not, absent a problem of self-defense, use firearms and is subject to civil or criminal sanctions for disregarding this rule. The rule is based on the view that, "It is better that he (the misdemeanant defendant eluding arrest or escaping from prison) be permitted to escape altogether than that his life be forfeited, while unresisting, for such a trivial offense."¹¹⁹ A court expressed that view in remanding for trial a wrongful death action by the father of a prison fugitive who was shot by a guard as he was running away from a prison work detail. The prisoner was serving a sentence for carrying a concealed weapon, a misdemeanor in the local jurisdiction. In another case, an Ohio police chief has been convicted of discharging fire arms for shooting a pistol in an attempt to apprehend a misdemeanant.¹²⁰ In convicting a police officer for criminal assault and battery in the use of firearms in apprehending a man for molesting a girl, a New Jersey court said,

Police officers must learn, if they are not already aware, that there are definite limitations upon the amount of force that may be used in arresting a citizen with a crime . . . ; that they may be held liable, both civilly and criminally, for the use of excessive force either in making a lawful arrest or in attempting to capture a fleeing offender . . .¹²¹

IV. THE DILEMMA IN IMPOSING CONTROLS OVER BONDSMEN'S OPERATIONS OR RETAINING BONDSMEN AND EXPANDING THE NONCOMMERCIAL FORMS OF BAIL

Proposals for controls over bondsmen's activities are now quite fashionable. Ohio presently is considering a prohibition of force, or the threat of force, in retrieving defendants.¹²² In addition, Ohio is considering a statutory encouragement of the use of one bond in felony cases from preliminary hearing and arraignment through trial,¹²³ with the consequence that bondsmen will receive only one premium in a felony release instead of his usual two. Consistent with the purpose of most state legislation dealing with bondsmen, this proposed legislation, particularly the prohibition against force, is responsive to a report of a bondsman's use of

¹¹⁶ See, e.g., *State v. Elder*, 120 N.E.2d 508 (Zanesville Mun. Ct. Ohio 1953); *State v. McLean*, 49 N.E.2d 778 (Ct. App. Ohio 1942).

¹¹⁷ See, e.g., *Rischer v. Meehan*, 11 Ohio C.C.R. 403 (Columbiana Co. Cir. Ct. 1896); *Noback v. Town of Montclair*, 33 N.J. Super. 420, 110 A.2d 339 (1954).

¹¹⁸ *Holloway v. Moser*, 193 N.C. 185, 136 S.E. 375 (1927).

¹¹⁹ *Id.* at 189, 136 S.E. at 377.

¹²⁰ *State v. Elder*, 120 N.E.2d 508 (Zanesville Mun. Ct. Ohio 1953).

¹²¹ *Noback v. Town of Montclair*, 33 N.J. Super. 420, 428, 110 A.2d 339, 343 (1964).

¹²² H.B. 777, 109th Ohio Gen. Assembly, Reg. Sess. 1971-1972.

¹²³ *Id.*

force which surfaced in the local press.¹²⁴ California now requires bondsmen to obtain a warrant before arresting a fugitive.¹²⁵ The Uniform Bail Bondsman Licensing Act adopted now by at least seven states¹²⁶ contains a comprehensive skein of prohibited acts, licensing requirements and required record keeping on fee and collateral demands by bondsmen—all of which has been passed for the benefit of revisers of bail bond laws.¹²⁷ Although the Uniform Act is silent on the bondsmen's retrieval powers, it shares with other less comprehensive legislative regulation of bondsmen the dilemma of approaching the problem of the bondsmen in the criminal process through legislative controls.

The cumulative effect of controls over bondsmen's operations, especially of the variety proposed in Ohio—although desirable *in se*—make the business of bondsmen more burdensome to operate, more visible through reporting requirements, and most probably less profitable. The result is likely to be a serious erosion of the *elan* of the bondsmen as a bounty hunter. Furthermore, constricting the operations of bondsmen which until recently were free from any type of control, is likely to result in a reduction of the number of persons for whom the bondsmen will write bail bonds. The same reasoning applies to the extension of judicial controls over bondsmen, as suggested in this article, including the suggestion that distant retrieval by bondsmen include a prior judicial hearing. The bondsmen would have to absorb out-of-pocket expenses incurred through the hearing requirement so long as he had no method to assert a claim for reimbursement.

This dilemma, inherent in the extension of statutory or judicial controls over bondsmen, is best demonstrated by the consequences of the occasional, highly publicized forfeitures by judges of one-hundred percent of defaulted bail bonds. This represents an assault *in extremis* on the financial interests of bondsmen, and the resulting strike by New York City bondsmen and the consequence of bulging prisons is illustrative of the expected result.¹²⁸

An identical problem has appeared in jurisdictions that have recently revised their bail laws to include a broader range of noncommercial forms of bail. Wisconsin revised its bail laws in July of 1970 to provide for release without bail or on an unsecured appearance bond in misdemeanors;¹²⁹ in felonies the release is by unsecured appearance bond.¹³⁰ In place of the

¹²⁴ See, Columbus Dispatch, July 28, 1970 at 1B, Cols. 2-5.

¹²⁵ CAL. PENAL CODE § 847.5 (1970).

¹²⁶ Murphy, *State Control of the Operation of Professional Bail Bondsmen*, 36 U. CIN. L. REV. 375, 391 (1967).

¹²⁷ *Id.* at 391-400.

¹²⁸ See text *supra* at 455.

¹²⁹ WIS. STAT. § 969.02 (1971).

¹³⁰ WIS. STAT. § 969.03 (1971).

aforementioned types of releases, the judge may utilize a variety of other releases including the ten percent deposit and the commercial bail bond. This broader flexibility in the forms of bail represents another threat to the economic interests of bondsmen. Since the adoption of these changes ten percent deposit has been used in at least thirty percent of the felony cases in Milwaukee, and there has been an increase in the use of unsecured personal bonds.¹³¹ The result has been that the defendants who pose little risk of nonappearance have been siphoned away from the business opportunities of bondsmen and the bondsmen are, consequently, more selective in writing bonds. The danger, of course, is that some people will not be released through this system who would have been released through the system that prevailed prior to the bail law change.

A similar situation has occurred in the District of Columbia. The Federal Bail Reform Act with its emphasis on release on personal recognizance and range of alternative conditional releases, including those of a noncommercial nature, has not eliminated bondsmen but has diverted much business away from bondsmen. The diminishing business opportunities for bondsmen has meant that bondsmen are unwilling to write bail bonds with a face amount of less than three thousand dollars because of the need to make a high economic return for each bond written. As a consequence, there are individuals who cannot now achieve pre-trial release in the District simply because the economic return to the bondsmen in writing the bond is not high enough.¹³² This includes persons selected by the court for release by bail with surety in an amount lower than three thousand dollars.

Revision of state bail laws, at a minimum, should result in the pre-trial release of as many persons and with as much expeditiousness as prevailed prior to the revision. Therefore, it is necessary to estimate the impact of a proposed revision on the bondsmen's operations, taking into account that the *raison d'être* of bondsmen is profit. This is especially true in the large number of states where the bondsmen currently effectuate a substantial number of pre-trial releases. Another consideration is whether the state bail system could operate without commercial sureties, relying on other forms of bail such as conditional release, release on own recognizance, and ten percent cash deposit. Such a system relies for its retrieval processes on federal and state law enforcement agencies that have already developed cooperative practices to apprehend state fugitive felons in interstate flight cases.¹³³ The experience since 1964 of Illinois, the first state to

¹³¹ Source of this information is Donald Thorgaard, Ass't Deputy Clerk for the Second Circuit, Criminal Division, Milwaukee, Wisconsin.

¹³² The source of the information is Bruce Beaudin, Director, District of Columbia Bail Agency. See also District of Columbia Bail Agency, Second Annual Report 10 (1968).

¹³³ SA J. MOORE, FEDERAL PRACTICE § 40.05, at 40-17, 40-18 (1970).

authorize the use of the ten percent deposit as a form of bail, demonstrates that a state bail system can operate effectively without bondsmen.¹³⁴

V. STATE RECOGNITION OF TEN PERCENT DEPOSIT

Since 1966 at least six states¹³⁵ have expressly authorized, as a form of bail, the deposit with the court clerk of a sum not to exceed ten percent of the amount of the bond. A revision of New York's bail laws, effective September 1, 1971, includes a "partially secured appearance bond" as one of the authorized forms of bail.¹³⁶ This is defined as a "bail bond secured only by a deposit of a sum of money not exceeding ten percent of the total amount of the undertaking."¹³⁷ The drafters of New York's revised bail laws explained that they had two reasons for adding the "partially secured" and unsecured bail bonds to the forms of authorized bail.¹³⁸ These forms of bail do not relax the amount of bail but they do provide for a release "somewhere between bail as presently authorized and release on one's own recognizance." Furthermore, it was hoped that the use of these forms of bail may furnish a method of reducing the portion of New York's prison population consisting of unconvicted defendants.

Some of these six states adopted ten percent deposit as part of a statutory adoption of a bail system closely paralleling the Federal Bail Reform Act;¹³⁹ and at least one state utilized court rule making power.¹⁴⁰

A. *The Illinois System*

The only state that has had extensive experience with ten percent deposit as a form of bail is Illinois, which has utilized this form of bail since 1964.¹⁴¹ Most of the other states that have authorized the ten percent deposit have done so only in the past two years, and Michigan, which authorized the ten percent deposit in 1966, has used this form of bail sparingly.¹⁴² The drafter of the current Illinois bail system has said that,

¹³⁴ See text *supra*, at 453.

¹³⁵ ALASKA STAT. § 12.30.020(b)(4) (Supp. 1970); IOWA CODE ANN. § 763.16 (Supp. 1971); MICH. COMP. LAWS § 780.66 (1968); VT. STAT. ANN. tit. 13, § 7553a (a) (3) (1967); WIS. STAT. ANN. §§ 969.02(2) (a), 969.03(1) (c) (1971); WYO. STAT. ANN. (Sup. Ct. R. Crim. P.) Rule 8 (Cum. Supp. 1969).

¹³⁶ N.Y. CRIM. PROC. LAW § 520.10(1)(e) (McKinney 1970).

¹³⁷ N.Y. CRIM. PROC. LAW § 500.10 (18) (McKinney 1970).

¹³⁸ Proposed N.Y. Crim. Proc. Law, § 385.10 (staff comment) (E. Thompson Co. 1967).

¹³⁹ See, e.g., ALASKA STAT. § 12.30.020 (Supp. 1970).

¹⁴⁰ WYO. STAT. ANN. (Sup. Ct. Rules of Crim. Proc.) Rule 8 (Cum. Supp. 1969).

¹⁴¹ ILL. ANN. STAT. ch. 38, § 110-7 (1970).

¹⁴² From the authorization in 1966 of ten percent deposit as a form of bail to September of 1970, only 284 ten percent deposit releases in non-traffic cases occurred in the Recorder's Court of the City of Detroit. Interview with Alex E. Renaud, Chief Bail Bond Bureau, Recorder's. During a one-year period of 1969, 3,848 surety bond releases were effectuated in the same court on felony charges alone. 1969 RECORDER'S COURT OF THE CITY OF DETROIT ANNUAL REPORT 7 (1969).

"[t]he ten percent provision is designed to restore the administration of bail to the courts . . . and to eliminate the private professional bail bondsmen from the criminal justice administrative processes."¹⁴³ The idea of the ten percent deposit was borrowed from a practice in some New York courts to give an accused an option of posting a one thousand dollar bail bond with commercial sureties or a deposit of one hundred dollars cash bond.¹⁴⁴ The practice was not often used in New York because of court administrative costs in handling the cash deposit. Illinois included in its ten percent deposit provision the retention of a small amount for bail bond costs. The retention of bail bond costs has not been included in some of the more recent state authorizations of the ten percent deposit as a form of bail, and continues to be a vexing problem in the adoption of this form of bail.¹⁴⁵

Bondsmen continued to flourish in Illinois for a few years after the enactment of the 1964 bail revision.¹⁴⁶ In 1965, the forms of bail described in the revision became the exclusive method of providing bail¹⁴⁷ and the legislature limited the use of the ten percent deposit privilege to only "the person for whom bail has been set."¹⁴⁸ To assure that the professional bail bondsmen had no relationship with the operation of the ten percent deposit form of bail, the circuit court in Cook County issued a rule that required court clerks to deliver receipts for ten percent deposits and to make refund checks payable only to defendants.¹⁴⁹ The last threat to the operation of ten percent deposit form of bail was removed when the Illinois Supreme Court reduced a bail amount from three hundred thousand dollars to thirty thousand dollars in a case where the trial judge had chosen the higher amount to avoid the effect of the ten percent deposit privilege.¹⁵⁰

¹⁴³ Hearings, *supra* note 6.

¹⁴⁴ Bowman, *The Illinois Ten Percent Bail Deposit Provision*, 1965 U. ILL. L.F. 35, 37.

¹⁴⁵ See, e.g., ALASKA STAT. § 12.30.020 (Supp. 1970). Retention of bail bond costs has been included in the Michigan and Wisconsin statutes. MICH. STAT. ANN. § 29.872(56) (1966); WIS. STAT. ANN. §§ 969.02, 969.03 (1971). The retention of bail bond cost continues to be a vexing problem in the use of 10% deposit as a form of bail. It was challenged in *Schille v. Kuebel*, 46 Ill.2d 538 264 N.E.2d 377 (1970) on the theory that it creates a discriminatory disparity between a homogenous class in that the bail cost retention does not apply to persons who provide bail by deposit of the full amount of bail. In addition, it was argued that retention of bail bond costs was an assessment of costs against a discharged defendant contrary to the Illinois constitution. The Illinois Supreme Court, with two Justices dissenting, upheld the retention of bail bond costs. *Id.* The Supreme Court has agreed to hear the appeal. 39 U.S.L.W. 3470 (U.S. April 27, 1971).

¹⁴⁶ Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584, 670.

¹⁴⁷ ILL. ANN. STAT. ch. 16, § 51 (Smith-Hurd Supp. 1971).

¹⁴⁸ ILL. ANN. STAT. ch. 38, §§ 110-7(a), 110-8 (Smith-Hurd 1970).

¹⁴⁹ Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584, 673 (1966).

¹⁵⁰ *People ex. rel. Yocca v. Ogilvie*, reported at Kamin, *Bail Administration in Illinois*, 53 ILL. B.J. 674, 683 (1965).

Currently, the ten percent deposit form of bail is widely used in Illinois,¹⁵¹ and according to all reports on the operation of the Illinois bail system, there are presently no professional bail bondsmen.¹⁵²

When the ten percent deposit legislation was submitted to the Illinois legislature, bondsmen and representatives of the few surety companies that specialize in bail bonds argued that the proposal was an assault on private enterprise and that the default rate on ten percent deposits would be as high as nine out of every ten releases. According to the bondsmen, the default rate in ten percent deposit releases would escalate dramatically because defendants, without fear of bondsmen, would not bother to appear.¹⁵³ The bondsmen pointed to the low default rate in bail bonds written by them. In 1962, 51,161 commercial surety bail bonds were written in the Municipal Court of Chicago, and 5,487 forfeited—a forfeiture rate of ten percent.¹⁵⁴ This forfeiture rate, and subsequent ones pertaining to Cook County, includes, as forfeitures, cases where the defendant did not appear at his court appearance date, and his non-appearance continued for thirty days thereafter.¹⁵⁵ These rates, therefore, do not take into account appearances after the thirty day period and consequently they appear higher than other reported forfeiture rates on bondsmen's releases elsewhere in the country.¹⁵⁶

The bondsmen's arguments could not be completely answered; consequently, the initial enactment in Illinois of the ten percent deposit provision, effective January 1, 1964, carried an automatic termination date of August 31, 1965.¹⁵⁷ Furthermore, the legislation, although originally proposed for application to all offenses throughout the state, contained a provision exempting traffic and minor misdemeanor charges punishable by fine only and those specified by the Illinois Supreme Court.¹⁵⁸

Despite some confusion in its initial operation,¹⁵⁹ the results of the legislation were excellent and the Illinois legislature re-enacted the ten percent deposit legislation in 1965 without a termination date on the urging of the judges who had experience with it during its eighteen month

¹⁵¹ See text *supra*, at 453.

¹⁵² Boyle, *Bail Under the Judicial Article*, 17 DE PAUL L. REV. 267, 271-275 (1968); Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584, 673 (1966).

¹⁵³ Bowman, *Illinois Ten Percent Bail Deposit Provision*, 1965 U. ILL. L.F. 35, 37-38.

¹⁵⁴ Boyle, *Bail Under the Judicial Article*, 17 DEPAUL L. REV. 267, 274 (1968).

¹⁵⁵ Under Illinois law, a judgment on defaulted bail is entered thirty days after the defendant's non-appearance. ILL. ANN. STAT. ch. 38 §§ 110-7 (g) (Smith-Hurd 1970).

¹⁵⁶ See Murphy, *State Control of Professional Bail Bondsmen*, 36 U. CIN. L. REV. 375, 403 (1967).

¹⁵⁷ ILL. ANN. STAT. ch. 38, § 110-7 (Smith-Hurd 1970).

¹⁵⁸ ILL. ANN. STAT. ch. 38, § 110-15 (Smith-Hurd 1970).

¹⁵⁹ C. Bowman, *Illinois Ten Percent Bail Deposit Provision*, 1965 U. ILL. L.F. 35, 38.

trial period.¹⁶⁰ Supporting legislation was also passed, including the requirement that provisions of the law granting the ten percent deposit privilege be prominently displayed in police stations¹⁶¹ and permitting the deposits to be received by peace officers and sheriffs.¹⁶²

The bondsmen's ominous predictions about the default rates under the ten percent legislation were wrong. Statistics from the criminal session of the Municipal District One of the Circuit Court for Cook County—formerly the Municipal Court of Chicago—showed that the default rate on ten percent deposit bonds during its test period from January 1, 1964, to August 1965, was slightly lower than the ten percent default rate on releases through the services of professional bail bondsmen.¹⁶³ The published statistics on the experience with ten percent deposit from 1965 to 1967 continued to show a default rate which matched that of bondsmen releases during the period prior to the demise of bondsmen in Illinois.¹⁶⁴

The most recent statistics covering experience with ten percent deposit in all courts in Cook County for the years 1968 and 1969 show that the early success in this form of bail has continued. Substantially all bail issues in misdemeanor and felony cases in Cook County are raised for the first time in the six districts of the Municipal Department of the Circuit Court for Cook County.¹⁶⁵ The first district has jurisdiction to decide the final merits of misdemeanor charges occurring in Chicago and to dispose of preliminary hearings on felony charges also occurring in the city. Jurisdiction over similar matters occurring out of the city but within Cook County is distributed among districts two through six of the Municipal Department.

According to the Clerk of the Circuit Court of Cook County, the following default rates were experienced in the widespread use of ten percent deposit for the two years ending December 31, 1969.¹⁶⁶ These default rates again match the ten percent default rate in releases effectuated by bondsmen prior to 1965—a rate which bondsmen had argued was unattainable with ten percent deposit.

¹⁶⁰ Kamin, *Bail Administration in Illinois*, 53 ILL. B.J. 674, 680 (1965).

¹⁶¹ ILL. ANN. STAT. ch. 38 § 103-7 (Smith-Hurd 1970).

¹⁶² ILL. ANN. STAT. ch. 16, § 81 (Smith-Hurd 1971).

¹⁶³ Kamin, *Bail Administration in Illinois*, 53 ILL. B.J. 674, 680 (1965); Bowman, *Illinois Ten Percent Deposit Provision*, 1965 ILL. L.F. 35, 39.

¹⁶⁴ Boyle, *Bail Under the Judicial Article*, 17 DEPAUL L. REV. 267, 274-275 (1968).

¹⁶⁵ For a complete description of the present structure of the Circuit Court for Cook County and its antecedent court structures prior to 1965, see Note, *Criminal Justice in Extremis: Administration of Justice During the April 1968 Chicago Disorder*, 36 U. OF CHI. L. REV. 455 (1969).

¹⁶⁶ Sources: Statistical Report, Dec. 1, 1967 to November 30, 1970, Clerk, Circuit Court of Cook County, interviews with Peter M. Deuel, Adm. Ass't. to Clerk, Circuit Court of Cook County.

	1968	
	District 1 (City of Chicago)	Districts 2-6 (Cook County except Chicago)
Number of Ten Percent Deposit Bonds	81,989	25,658
Number of Forfeitures	8,856	3,369
Default Rate	10.7%	13.1%
	1969	
Number of Ten Percent Deposit Bonds	84,202	27,308
Number of Forfeitures	10,402	2,866
Default Rate	11.7%	10.5%

VI. THE MANAGERIAL ASPECTS OF STATE BAIL BOND LAWS

In the course of a discussion of legislation permitting the use of notices to appear by police, it has been suggested that the mere passage of permissive legislation is not sufficient to effectuate the desired change in police operations.¹⁶⁷ This is especially true of legislative revision of bail bond laws. The recent legislative revisions that have taken place in some states and in the District of Columbia seem detached from reality when the promise of the legislation is compared with the actual operation of the revised bail bond laws. This is illustrated by the fate of state and federal bail legislation selecting "release on own recognizance"¹⁶⁸ or "release on unsecured bond" as the presumptive form of bail and by the early experience of Illinois ten percent deposit legislation.¹⁶⁹

A. *Presumptive Release on Own Recognizance*

Perhaps some of the most poorly drafted provisions in state criminal codes are those dealing with bail. The form of bail which functionally operates as a release of a defendant without any prior financial cost is called "release on own recognizance"¹⁷⁰ or release on "personal bond,"¹⁷¹ or release on "unsecured appearance bond."¹⁷² Pennsylvania enacted in 1966 a unique form of bail called "nominal bail,"¹⁷³ which was bail secured by one dollar conditioned by the defendant as principal and an official designated by the court as surety. According to the drafters, this was intended to replace the system of releasing a defendant on his own

¹⁶⁷ LaFave, *Alternatives to the Present Bail System*, 1965 U. ILL. L.F. 8, 13.

¹⁶⁸ See Appendix II for a compilation of state statutory authorization for the release of defendants on their own recognizance.

¹⁶⁹ See text *supra* p. 453.

¹⁷⁰ See, e.g., OHIO REV. CODE ANN. § 2937.20 (Page Supp. 1970).

¹⁷¹ See, e.g., TEX. CODE CRIM. PROC. art. 17.04 (1966).

¹⁷² IOWA CODE ANN. § 763.16 (Supp. 1971); WYO. STAT. ANN. (Sup. Ct. Rules) Rule 8 (Supp. 1969).

¹⁷³ PA. STAT. ANN. tit. 19, §§ 4001(b), 4007 (Supp. 1971).

recognizance and to include a nominal surety who could apprehend a defendant across state lines without the necessity of extradition proceedings.¹⁷⁴ In actual operation, nominal bail, at least in Philadelphia, has been transformed into a release without surety which directly contradicts the intention of the legislature.¹⁷⁵ This has happened for the reason that the possible candidates for "nominal surety," such as court clerks, hesitated to indulge in the practice of private retrievers of fugitive defendants—a practice in which the limits of legal responsibility are unclear.

The New York Commission on Revision of the Penal Law and Criminal Code said that the New York bail laws were "virtually unintelligible and, in their entirety . . . present a chaotic scheme that defies summary and analysis."¹⁷⁶ The commission proposed "a fresh . . . phraseological approach"¹⁷⁷ and developed a general definitional section of fifteen definitions, about one third of the general definitions applying to the ten articles of the Uniform Commercial Code.¹⁷⁸

Although the etymology and present meanings of the phrase "release on own recognizance" have been stated elsewhere,¹⁷⁹ a brief statement of the change in meaning of a "release on own recognizance" illustrates the confusion in language that currently describes state bail systems. At common law such a release meant a release based upon a formal acknowledgment by a person that he owed a sum of money to the state, made "in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behavior, or the like . . ."¹⁸⁰ A recognizance release and a release on a bail bond, although different in the manner of execution and enforcement of the money obligation,¹⁸¹ were alike in that both involved an obligation to pay money if the accused did not appear. Critics of the bail system then began to use the phrase "release on own or personal recognizance" to designate a release based simply on a promise to appear.¹⁸² In the effort to aid the indigent in the bail system, recognizance releases were emphasized to obviate the necessity of a commercial or other surety, but in the process, the nature of a recognizance as a money obligation seems

¹⁷⁴ PA. STAT. ANN. tit. 19, § 4007 (staff comment) (Supp. 1971).

¹⁷⁵ Discussion with Erwin Lodge, Clerk, Court of Quarter Sessions sitting in Philadelphia, Penn.

¹⁷⁶ Proposed New York Crim. Proc. Law. Staff Comment to Title V, Release on Recognizance and Bail at p. 424 (E. Thompson Co., N.Y. 1967).

¹⁷⁷ *Id.*

¹⁷⁸ UNIFORM COMMERCIAL CODE § 1-201 (1962 official text).

¹⁷⁹ Murphy, *State Control of the Operation of Professional Bail Bondsmen*, 36 U. CIN. L. REV. 375, 410 (Appendix II) (1967).

¹⁸⁰ 2 BLACKSTONE, COMMENTARIES 928 (Lewis ed. 1900).

¹⁸¹ 2 BLACKSTONE, COMMENTARIES 802 (Lewis ed. 1900); see RESTATEMENT OF CONTRACTS § 9 (1932). For a discussion of the origin of recognizance, see 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 203-204 (2d ed. 1968).

¹⁸² D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964, at 62 (1964).

to have been forgotten. Some recently enacted state statutes authorizing release on own recognizance clearly change the common law meaning of a recognizance as a formally executed money obligation.¹⁸³ Other states, such as Ohio, have also recently enacted release on own recognizance statutes¹⁸⁴ but have failed to deal with the meaning of this type of release. The result is a difference between what the state statutes say and what the state courts do. For example, although Ohio bail statutes refer to "recognizance" as an undertaking to forfeit a sum set as bail,¹⁸⁵ the practice of many Ohio courts is to treat the release on own recognizance statute as authorizing release on a promise to appear without any money obligation.

The language difficulties in revision of bail bond laws dealing with nonfinancial releases, such as recognizance releases, are slight when compared with the problems of implementing legislative intent expressed in the revision. In this regard, the drafters should take care to understand how the bail system is in fact managed in the state or else elements of the revision may amount to a superficial statutory cast set over a bail system that does not change. Experience with presumptive release on own recognizance statutes illustrate this point.

One of the elements of the 1964 bail revision in Illinois was an authorization for release of an accused on his own recognizance which contained a statement of legislative intent as part of the statutory language: "This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused."¹⁸⁶ Despite claims of "liberal use of release upon recognizance" as an accomplishment of the Illinois bail system,¹⁸⁷ release on own recognizance is used in only four percent of the pre-trial releases in Illinois. Under the Illinois statutory scheme of bail, release can occur through release on own recognizance,¹⁸⁸ ten percent deposit,¹⁸⁹ or deposit of cash, stock, bonds or real estate valued at the bail amount.¹⁹⁰ Statistics from the operation of the seven districts within the Municipal Department of the Circuit Court of Cook County show that release on own recognizance is seldom used.

The monetary releases through cash bail or ten percent deposit, taken together, account for ninety-six percent of the releases despite the Illinois legislative intention to minimize monetary sanctions for non appearance.

¹⁸³ See, e.g., CAL. PENAL CODE § 1318.4 (1970).

¹⁸⁴ OHIO REV. CODE ANN. § 2937.29 (Page Supp. 1970).

¹⁸⁵ E.g., OHIO REV. CODE ANN. §§ 2937.22 (C), 2937.36 (C) (Page Supp. 1970).

¹⁸⁶ ILL. ANN. STAT. ch. 38, § 110-2 (Smith-Hurd 1970).

¹⁸⁷ Boyle, *Bail Under the Judicial Article*, 17 DEPAUL L. REV. 267 (1967).

¹⁸⁸ ILL. ANN. STAT. ch. 38, § 110-2 (Smith-Hurd 1970).

¹⁸⁹ ILL. ANN. STAT. ch. 38, § 110-7 (Smith-Hurd 1970).

¹⁹⁰ ILL. ANN. STAT. ch. 38, § 110-8 (Smith-Hurd 1970).

District 1 (Chicago)

1968

	Cash Bail	Ten Percent Deposit	Release on Own Recognizance
Number of Releases	138,909	81,989	10,547
Percentage of Total Releases	60.0%	35.4%	4.6%

1969

Number of Releases	139,052	84,202	9,777
Percentage of Total Releases	59.7%	36.1%	4.2%

Districts 2-6 (Cook County other than Chicago)

1968

	Cash Bail	Ten Percent Deposit	Release on Own Recognizance
Number of Releases	51,258	26,865	3,584
Percentage of Total Releases	62.7%	32.9%	4.4%

1969

Number of Releases	55,301	30,001	4,199
Percentage of Total Releases	61.8%	33.5%	4.7%

The reason for this frustration of legislative intent is two-fold. First, through a combination of a bail schedule with pre-set bail sums for certain misdemeanors¹⁹¹ and the power of police officers to take bail in its monetary forms of cash or ten percent deposit,¹⁹² the interest of an accused in obtaining release after arrest without delay can be served only through the monetary forms of bail. In felony cases, there is the potential for use of release on own recognizance in that judicial intervention is necessary prior to the release for bail setting purposes, which intervention includes the possibility of ordering a release on own recognizance. But the courts, including the all night bail bond court in Chicago, seldom exercise this power.¹⁹³ The courts' reluctance has a reasonable basis in that, except for a small program commenced by the Circuit Court for Cook County,¹⁹⁴ there is no administrative mechanism available to the court for verifying the defendant's community connections through residence, employment, or family ties, or for reinforcing the defendant's court appearance obligation by notification and contact during the release period. This contrasts with

¹⁹¹ ILL. ANN. STAT. ch. 38, § 110-15 (Smith-Hurd 1970).

¹⁹² ILL. ANN. STAT. ch. 38, § 110-9 (Smith-Hurd 1970).

¹⁹³ For a brief description of the night bail bond court, see Boyle, *Bail Under the Judicial Article*, 17 DEPAUL L. REV. 267, 270 (1968). By the author's observation of the operations of the bail bond court and a review of its recent docket, it appears that release on own recognizance is currently occurring in approximately one out of every twenty-five cases.

¹⁹⁴ The program was commenced on August 15, 1968. Interviews are limited to those who had an opportunity to be released through one of the two forms of monetary releases, failed to do so, and are imprisoned. Apparently there is no contact maintained with the defendant during the release or mechanism for notification of court appearance date. Memorandum by Marshall J. Pidgeon to the Circuit Court for Cook County dated February 26, 1971.

the tie of the defendant to his court appearance in the cash or ten percent deposit release arising out of the prospect of the return of the security.

A similar situation exists, apparently, in the District of Columbia through the combined effect of a bail schedule and the power of the precinct police lieutenant, acting as a deputy clerk for the federal or District of Columbia court, to accept a monetary form of bail. One interesting aspect is that the police, in contrast with the Illinois practice, will generally accept only a bail bond with commercial surety, which means that bondsmen continue to have a large role in effectuating the accused's interest in release without delay after arrest.¹⁹⁵

In some parts of Ohio, such as Cincinnati, the effect of a local bail schedule extending to misdemeanors and—perhaps invalidly¹⁹⁶—to felonies, combined with the power of the clerk to receive bail in the scheduled amount, has sharply reduced the application of Ohio's recently enacted release on own recognizance statute. The clerk's office is open twenty-four hours a day to facilitate speedy monetary release after arrest. Although not limited in its terms to indigents, the statute seems to be applied largely to persons who could not obtain their monetary release shortly after arrest and who, consequently, are forced to remain in jail to await the court's decision on release on own recognizance.¹⁹⁷

B. *Individualization of the Bail Issue*

The central issue in the release on own recognizance statutes and other noncommercial releases is the extent to which the bail issue in criminal cases in state courts should be individualized both as to the amount and form of bail. The issue involves a crossfire of competing interests on both the level of the individual defendant and of the state. From the perspective of the accused, there is the interest in release as soon as possible after arrest and the necessary police processing. This has been satisfied by the extensive use of bail schedules and the common state statutory extension of power to court clerks or police to receive monetary bail. There is no factual investigation for bail intervening between arrest and release and the clerk or the police are usually available on a twenty-four hour basis to receive monetary bail. In this system, the booking officer or the court clerk merely consults his list, locates the name of the charge and advises the defendant of the pre-set amount of bail. There is no inquiry into the background of the defendant, family or community ties, employment record,

¹⁹⁵ Information obtained from Bruce D. Beaudin; Director, District of Columbia Bail Agency.

¹⁹⁶ The statutory authority establishing a bail schedule is contained in OHIO REV. CODE ANN. § 2937.23 (Page Supp. 1970) and seems to apply only to misdemeanors.

¹⁹⁷ See generally Murphy, *State Control of the Operations of Professional Bail Bondsmen*, 36 U. CIN. L. REV. 375, 406-407 (1967).

or record of prior failures to appear. Bail is set solely according to the charge.

Competing against this interest in speedy release is the constitutional interest of all defendants to an opportunity to have a hearing on the bail issue and the constitutional interest of indigents to have equal treatment in the application of state bail laws. It was on the basis of both these interests that a federal court recently held that a bail schedule in Dade County, Florida, violated the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.¹⁹⁸ *Ackies v. Purdy*,¹⁹⁹ was a class action against the County Public Safety Director on the theory that the county bail schedule as administered by the Director and his agents violated the plaintiff's constitutional right to a hearing, to equal application of the bail laws, and to have reasonable bail set.²⁰⁰ The court found from the statistical files of the state court that if a defendant cannot afford the bond set in the schedule he remains in jail from three days to three weeks before a judicial appearance and that the resultant incarceration of indigents definitely causes an overcrowding of jail facilities. During a two year period, "a minimum of 680 persons were incarcerated in the Dade County Jail because of their inability to post the master bail bond for approximately 30 days between the time of arrest and their first appearance before a judicial officer."²⁰¹

Based upon *Goldberg v. Kelly*,²⁰² the court held that the plaintiff's right to a hearing before being deprived of liberty for periods of days or weeks was violated by the operation of the bail schedule. With respect to the equal protection issue, the court applied the more active standard of judicial review developed by the Supreme Court in reviewing state limitations on voting rights²⁰³ and travel.²⁰⁴ The *Ackies* court held that complete loss of personal liberty for days or weeks for the group of defendants who could not afford the scheduled bail was a "fundamental interest" of the plaintiffs which could be restricted by the operation of the state bail schedule only if a compelling state interest supported the restriction. The court found no such state interest and noted that, "A poor man with strong ties in the community may be more likely to appear than a man with some cash and no community involvement."²⁰⁵

The relief shaped by the court reflects other interests at stake in the question of the use of bail schedules and the extent to which a state must

¹⁹⁸ *Ackies v. Purdy*, 322 F. Supp. 38 (S.D. Fla. 1970).

¹⁹⁹ *Id.*

²⁰⁰ The action was based on 42 U.S.C. § 1983 and jurisdiction was based on 28 U.S.C. § 1343(3).

²⁰¹ *Ackies v. Purdy*, 322 F. Supp. 38, 40 (S.D. Fla. 1970).

²⁰² 397 U.S. 254 (1970).

²⁰³ See, e.g., *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

²⁰⁴ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²⁰⁵ *Ackies v. Purdy*, 322 F. Supp. 38, 42 (S.D. Fla. 1970).

individualize the bail issue in the operation of its bail laws. The court realized that total elimination of the bail schedule in a state bail system with large numbers of criminal cases would result in jailing of a large number of people with finances, at least overnight or until brought before a magistrate for a release hearing. These people had been able to obtain immediate freedom after arrest through use of the bail schedules and the court was "not disposed toward forcing these people to remain in jail" so that all defendants could be afforded the privilege of a release hearing.²⁰⁶ The court ordered that the bail schedule could operate only if the accused is first informed of his right to a bail hearing without unnecessary delay and thereafter the accused voluntarily waives this right.

Another problem, not mentioned by the *Ackies* court, is the cost to the state of more extensive individualization of bail, particularly with respect to nonfinancial releases such as release on own recognizance. In contrast with cash bail or ten percent deposit with the prospect of return of the cash or deposit on court appearance, there is little to tie the defendant in a nonfinancial release to his court appearance unless there is a system of contact with the defendant or, at minimum, a notification. This is best illustrated by the growing pains of the District of Columbia Bail Agency,²⁰⁷ created by Congress as the administrative investigative agency to facilitate court use of the Federal Bail Reform Act. A Judicial Council Committee appointed by Chief Judge Bazelon was appointed in 1968 to study bail operations in the District. The report of the committee recommended that the Bail Agency be "drastically expanded to enable it to provide reports that would be more detailed and more thoroughly verified for bail setting magistrates; to provide notice of court appearances; and to supervise pre-trial releases."²⁰⁸ Another 1970 judicial study recommended expansion of the Bail Agency "as the first and most important step to be taken to effectuate efficient administration of the (Bail Reform) Act."²⁰⁹ In June of 1970, the Bail Agency expanded its staff and opened its office on a twenty-four hour basis, seven days a week, thereby sharply increasing its 1969 budget of \$116,000.²¹⁰

Recent state bail reform tends to borrow from the Federal Bail Reform Act with the requirement that the bail hearing take into account community ties and the options of conditional release. This is likely to be a paper accomplishment, particularly with nonfinancial releases, if the necessary administrative mechanisms are not available to the courts for investigation and verification of community ties and minimal contact with the defendant

²⁰⁶ *Id.*

²⁰⁷ D.C. CODE ANN. §§ 23-901 *et. seq.* (1967).

²⁰⁸ Beaudin, *Bail in the District—What It Was; Is; and Will Be*. 20 AM. U. L. REV. 432, 436 (1971).

²⁰⁹ *Id.* at 438.

²¹⁰ District of Columbia Bail Agency, Third Annual Report.

during release. The lesson of five years of operation of the Federal Bail Reform Act shows that efficient administration of the Act is possible only with the supporting administrative agency.

One method of individualizing the pre-trial release issue is not in the realm of bail but that of arrest. This involves expansion of the "arrest-notice" power of the police in misdemeanor cases. Under such a power, which exists in some state and city legislation,²¹¹ police take custody of the individual, complete the necessary booking and identification processes, and then have the power to release the defendant with a notice to appear. Use of the arrest-notice power by the police on a systematic basis with excellent results has been reported in different parts of the country.²¹² Under some legislation²¹³ authorizing arrest-notice, the police must take into account the same factors, such as community ties, which are usually examined by a magistrate for purposes of deciding a release on own recognizance. The advantage of the arrest-notice power in the case of indigents charged with misdemeanors is that the arrest-notice release eliminates the delay involved in bringing the defendant before the court for a release based on nonfinancial forms of bail, such as release on own recognizance.

The similarity in factual inquiry on the question of arrest-notice release by police immediately after misdemeanor arrest and on the question of release on own recognizance by the court, usually with some delay after arrest, has led the Bail Agency in the District of Columbia to assist the police by interviewing and verifying information about indigent defendants. In 1969, one thousand eighty-four persons were referred to the Bail Agency by the District police, and five hundred sixty-two were recommended for release. The Agency is urging more systematic implementation of arrest-notice.²¹⁴

APPENDIX I

Statutory Authorization for Bondsmen's Arrest Power

1. The following states do not provide statutory authority for a bondsman to arrest an accused:

Alaska
New Jersey
South Carolina
Maryland
Illinois

²¹¹ See, e.g., Cincinnati, Ohio Code § 903-4, § 903-5 (1956); ILL. ANN. STAT. ch. 38, § 107-12 (Smith-Hurd 1970).

²¹² Note, *An Alternative to the Bail System: Penal Code Section 853.6*, 18 HASTINGS L.J. 643 (1967).

²¹³ See, e.g., Cincinnati, Ohio Code § 903-5 (1956).

²¹⁴ District of Columbia Bail Agency, Third Annual Report (1969). See Beaudin, *Bail in the District of Columbia*, 20 AM. U. L. REV. 432 (1971).

2. The following states provide express statutory authority for a bondsman to arrest the accused:

Alabama: ALA. CODE tit. 15, §§ 209, 210 (1959).
 Arkansas: ARK. STAT. ANN. § 43-718 (1964).
 California: CAL. PENAL CODE § 1301 (West 1970).
 Florida: FLA. STAT. ANN. §§ 903.22, .29 (Supp. 1971).
 Idaho: IDAHO CODE § 19-2925 (1948).
 Indiana: IND. ANN. STAT. § 3-316 (1968); § 9-3730 (1970).
 Iowa: IOWA CODE § 768.2 (1950).
 Kansas: KAN. STAT. ANN. § 22-2809 (Supp. 1970).
 Kentucky: KY. R. CRIM. P. 4.24 (1969).
 Louisiana: LA. CODE CRIM. PRO. ANN. art. 340 (West 1967).
 Michigan: MICH. STAT. ANN. § 28.913 (1954).
 Minnesota: MINN. STAT. § 629.63 (1947).
 Montana: MONT. REV. CODES ANN. § 95-1115 (1969).
 Nevada: NEV. REV. STAT. § 178.526 (1969).
 North Carolina: N. C. GEN. STAT. § 15-122 (Supp. 1969).
 North Dakota: N. D. CENT. CODE § 29-08-20 (1960).
 Oklahoma: OKLA. STAT. tit. 22, § 1107 (1958); tit. 59, § 1329 (1971).
 Oregon: ORE. REV. STAT. § 140.420 (1969).
 Pennsylvania: PA. STAT. tit. 19, § 53 (1964).
 South Dakota: S. D. CODE § 23-26-9 (1969).
 Tennessee: TENN. CODE ANN. § 40-1227 (1955).
 Utah: UTAH CODE ANN. § 77-43-22 (1953).
 Virginia: VA. CODE ANN. § 19.1-144 (1960).
 Wisconsin: WIS. STAT. § 969.14 (1971).

3. The following states have statutory authority enabling bondsmen to surrender the body of the accused to the court or a law enforcement official. The bondsmen's power of arrest can be reasonably implied from these provisions:

Arizona: ARIZ. REV. STAT. ANN. § 13-1405 (1956).
 Colorado: COLO. REV. STAT. ANN. § 29-2-18 (1964).
 Connecticut: CONN. GEN. STAT. ANN. § 54-65 (1960).
 Delaware: DEL. SUPER. CT. (CRIM.) R. 46 (g).
 Georgia: GA. CODE ANN. § 27-904 (1953).
 Hawaii: HAWAII REV. LAWS § 709-14 (1968).
 Maine: ME. R. CRIM. P. 46 (F) (1970).
 Massachusetts: MASS. GEN. LAWS ANN. ch. 276, § 68 (Supp. 1971); § 69 (1968).
 Mississippi: MISS. CODE ANN. §§ 2493, 2494 (1957).
 Missouri: MO. REV. STAT. §§ 544.600, .610 (1953).
 Nebraska: NEB. REV. STAT. §§ 29.905, .906 (1965).
 New Hampshire: N. H. REV. STAT. ANN. §§ 597:27, :28 (Supp. 1970).
 New Mexico: N. M. STAT. ANN. §§ 41-4-20, -22 (1953).
 New York: N. Y. CRIM. PROC. LAW § 530.80 (McKinney 1970).
 Ohio: OHIO REV. CODE ANN. § 2937.36 (Page Supp. 1970).
 Rhode Island: R. I. GEN. LAWS ANN. §§ 12-13-18, -19 (Supp. 1970).
 Texas: TEX. CODE CRIM. PROC. ANN. art. 17.16 (1966).
 Vermont: VT. STAT. ANN. tit. 13, §§ 7560, 7570 (1958).
 Washington: WASH. REV. CODE § 10.19.105 (1961).
 West Virginia: W. VA. CODE ANN. § 62-1C-12 (1966).
 Wyoming: WYO. R. CRIM. P. 8 (e) (5) (Supp. 1969).

APPENDIX II

State Legislative Authorization of Release on Own Recognizance

1. In the following states, authorization to release on own recognizance was part of a major revision of the state bail laws paralleling the Federal Bail Reform Act thereby, making release on own recognizance the presumptive form of bail:

Alaska
Arizona
Iowa
Kansas
South Carolina
Vermont
Wyoming

2. At least thirty-six states have enacted statutes authorizing release of defendants on their own recognizance:

Alabama: ALA. CODE tit. 15, § 187 (1959).
Alaska: ALASKA STAT. § 12.30.020 (1970).
Arizona: ARIZ. REV. STAT. ANN. § 13-1577 (Supp. 1970).
California: CAL. PENAL CODE § 1318 (West 1970).
Colorado: COLO. REV. STAT. ANN. § 37-17-12 (1966).
Connecticut: CONN. GEN. STAT. ANN. § 54-1a (Supp. 1971).
Delaware: DEL. CODE ANN. tit. 11, § 2104 (Supp. 1969).
Florida: FLA. STAT. ANN. § 903.03 (2) (a) 3 (Supp. 1971).
Georgia: GA. CODE ANN. § 27-911 (Supp. 1970).
Illinois: ILL. REV. STAT. ch. 38, § 110-2 (1970).
Iowa: IOWA CODE § 763.16 (Supp. 1971).
Kansas: KAN. STAT. ANN. § 22-2802 (Supp. 1970).
Louisiana: LA. REV. STAT. § 15:574.15 (1967);
LA. CODE CRIM. PRO. ANN. art. 336 (West Supp. 1971).
Maine: ME. R. CRIM. P. 46 (d) (1970).
Maryland: MD. ANN. CODE art. 27, § 638A (1971).
Massachusetts: MASS. GEN. LAWS ANN. ch. 276, § 58 (Supp. 1971).
Michigan: MICH. STAT. ANN. § 28.872 (52) (Supp. 1971).
Minnesota: HENNEPIN CTY. MUN. CT. (Crim.) R. 35.
Montana: MONT. REV. CODES ANN. § 95-1106 (1969).
Nevada: NEV. REV. STAT. § 178.502 (1969).
New Hampshire: N. H. REV. STAT. ANN. § 597:1 (Supp. 1970).
New Mexico: N. M. STAT. ANN. § 36-6-6 (Supp. 1969).
New York: N. Y. CRIM. PROC. LAW §§ 530.10-40 (McKinney 1970).
North Carolina: N. C. GEN. STAT. § 15-103.1 (Supp. 1969).
Ohio: OHIO REV. CODE ANN. § 2937.29 (Page Supp. 1970).
Oklahoma: OKLA. STAT. ANN. tit. 59, § 1334 (1971).
Oregon: ORE. REV. STAT. § 140.720 (1969).
South Carolina: S. C. CODE ANN. § 17-300 (Supp. 1970).
Tennessee: TENN. CODE ANN. § 6-2123 (Supp. 1970).
Texas: TEX. CODE CRIM. PROC. art. 17.03 (1966).
Vermont: VT. STAT. ANN. tit. 13, § 7553a (Supp. 1970).
Virginia: VA. CODE ANN. § 19.1-110 (Supp. 1970).
Washington: WASH. REV. CODE ANN. § 3.50.220 (Supp. 1970).

West Virginia: W. VA. CODE ANN. § 62-1C-4 (1966).

Wisconsin: WIS. STAT. ANN. §§ 969.02, .03 (1971).

Wyoming: WYO. R. CRIM. P. 8 (c) (Supp. 1969).